

EXHIBIT B

Nos. 20-13730 and 20-14067

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DONNA CURLING, et al.,

Plaintiffs-Appellees,

v.

BRAD RAFFENSPERGER, in his official
capacity as Secretary of State
of Georgia and the Chair of the Georgia
State Election Board, et al.,
Defendants-Appellants.

Oral Argument

May 19, 2022

B E F O R E :

HON. ROBERT LUCK

HON. BRITT GRANT

HON. LANIER ANDERSON

Appellant Judges

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1 P R O C E E D I N G S

2 HON. BRITT GRANT: We're now ready for
3 our next case, Curling versus Secretary of State
4 for the State of Georgia. Mr. Tyson, whenever
5 you are ready.

6 MR. TYSON: Thank you, Your Honor.

7 May it please the Court, Bryan Tyson.

8 HON. ROBERT LUCK: Give me one second
9 for opposing counsel.

10 MR. TYSON: Oh, sorry. I apologize. I
11 didn't know they weren't set.

12 HON. ROBERT LUCK: No, no. You're
13 fine. Take your time. Just want to make sure
14 everyone is settled. Thank you. Go ahead.

15 MR. TYSON: Thank you. May it please
16 the Court, my name is Bryan Tyson. I represent
17 the Secretary of State and State Election Board
18 in this matter.

19 The procedural history of this case,
20 Your Honors, is complicated at best, so I thought
21 it might be helpful just to kind of summarize how
22 we got to this point in this case.

23 This case began in 2017 as an election
24 contest to Georgia 6th Congressional District
25 special election. After it was removed to

1 federal court, it was transformed into a
2 challenge to the then-method of voting in Georgia
3 using direct recording electronic voting machines
4 called DREs.

5 The State -- there was litigation for
6 several years over that. After the State
7 purchased new equipment in 2019, the district
8 court entered an order saying you can't use the
9 old equipment anymore and then transformed the
10 case into a challenge of the Dominion equipment
11 that had been purchased by the State in 2019.

12 HON. ROBERT LUCK: Counsel, I don't
13 want to tell you how to use your time, but you
14 don't have a lot of it. So tell me what you'd
15 like for us to reverse on.

16 MR. TYSON: Certainly, Your Honor. So
17 the first element is definitely the issue of
18 standing. The district court found that there
19 was standing for the plaintiffs in this matter
20 based only on generalized grievances.

21 HON. ROBERT LUCK: So let's -- I want
22 to go to standing but maybe in a different way
23 that the district court looked at, although maybe
24 the same.

25 Let's talk about organizational

1 standing. We have held, as I understand it,
2 election challenges similar to this one or
3 election challenges generally that a diversion of
4 resources theory for organizational standing is
5 sufficient to alleged injury in fact.

6 MR. TYSON: That's correct.

7 HON. ROBERT LUCK: You agree with that.

8 MR. TYSON: I do, Your Honor.

9 HON. ROBERT LUCK: Did they not allege
10 diversion of resources?

11 MR. TYSON: Your Honor, the plaintiffs
12 did allege a diversion of resources, the
13 Coalition itself.

14 HON. ROBERT LUCK: Yes.

15 MR. TYSON: I think the issue we have
16 here is the district court affirmatively
17 prevented the State from examining the issues
18 around the diversion of resources at the
19 preliminary injunction hearing and relied only on
20 some declarations, and then the plaintiffs cite
21 only declarations filed after the court's order
22 in terms of the nature of the diversion of
23 resources.

24 HON. ROBERT LUCK: There may be an
25 error. You can show me in your brief. There may

1 be an error of the district court in limiting you
2 in discovery, but that's not how I understand
3 this was presented to us. This was presented to
4 us simply as there isn't evidence of standing.
5 Is that right?

6 MR. TYSON: Yes, Your Honor. That is
7 correct.

8 HON. ROBERT LUCK: At least under the
9 allegations and the affidavit presented by the
10 executive director for the Coalition, it seems to
11 me that there is evidence of diversion of
12 resources. Now, whether that evidence is
13 sufficient, let's talk about. But it seems to me
14 that there are at least allegations that, hey, we
15 would have -- but for this law which we're now
16 spending money to educate and to fight in some
17 way, we would've spent money in Colorado doing
18 auditing and North Carolina doing election reform
19 efforts, and in others. I think South Carolina
20 was another state that they do work in as well.

21 MR. TYSON: Yes, Your Honor. And I
22 think the key point is the nature of the
23 generalized grievance still applies on the
24 organizational standing and the sufficiency
25 because if you look at (indiscernible) from the

1 6th Circuit, they discuss how the generalized
2 nature of the grievances affected all the nature
3 of standing. The individual plaintiffs --

4 HON. ROBERT LUCK: Diversion of
5 resources isn't generalized to every voter. I
6 mean, that's the issue with generalized, right,
7 which is -- and I think you might have a point
8 with the individuals.

9 MR. TYSON: Mh hmm.

10 HON. ROBERT LUCK: That theirs is the
11 same as everyone -- every other voter is, and
12 they need something particularized or special as
13 to them. But there's no one else who's claiming,
14 that I know of, that but for this law, I would
15 have spent money doing other election reform
16 efforts elsewhere. This seems to be not general
17 but specific to the Coalition.

18 HON. BRITT GRANT: Let me put it a
19 different way. What do you identify specifically
20 as different between this set of -- this
21 organizational plaintiff versus the dozens that
22 we found standing for in other election cases?

23 MR. TYSON: And Your Honor, I think the
24 key difference is the only evidence in the record
25 as far as the 990s are the Coalition exists to

1 litigate. That is its sole purpose. Whether it
2 was a declaration to the contrary -- and I think
3 again, the idea that --

4 HON. ROBERT LUCK: So I looked at that.
5 And I know you make that argument, but in their -
6 - at least in their allegations, they say -- the
7 executive director -- it is alleged the executive
8 director would do education and other -- now have
9 to spend efforts on education, instruction, and
10 litigation as a result, and otherwise would have
11 done work on auditing and election reform
12 efforts, which is not litigation related.

13 So it seems to be -- you might have a
14 point if the only goal was litigation, and that's
15 what they're doing, but this seems to be not
16 that. This seems to be true diversion from at
17 least something else.

18 MR. TYSON: Yes, Your Honor. I'll just
19 -- I'll make one last point. Then I'll move on
20 from this. But just I think it's important to
21 consider too this Court's post-2020 litigation.
22 The idea that if an individual had merely
23 incorporated, they could've transformed their
24 generalized grievances into sufficient
25 organizational standing merely by the act of

1 incorporating I think is a problematic view of
2 how to look at Article 3 standing, but I'll move
3 on to some of the other bases we have here.

4 HON. BRITT GRANT: I've got a question
5 actually. Can you point me to an injunction
6 related to the scanner issue?

7 MR. TYSON: Yes, Your Honor. So I
8 think the key issue is the specificity on Rule
9 65. The cases in Rule 65 focus on it was a
10 district court that didn't call what it did an
11 injunction actually issuing an injunction.
12 That's where most of the caselaw is on that.

13 In this case, you had the district
14 court saying three times that it is granting
15 relief, that it is granting the motion for
16 preliminary injunction. Those statements
17 indicate the district court intended to enter an
18 injunction, but it didn't specify what the
19 requirements were.

20 HON. BRITT GRANT: Didn't it ask the
21 State for a proposed injunction? And I assume --
22 I think I see in the record that you all provided
23 that, but I don't see where one was ever entered.

24 MR. TYSON: That's correct, Your Honor.
25 There was never a specific threshold entered for

1 the scanner.

2 I think the key for the State is there
3 have been multiple situations in this case and in
4 the common cause case that was recently before
5 this Court where an injunctive relief of some
6 sort was entered. From the State's position, it
7 didn't change anything the State was already
8 doing.

9 So for example, the 2019 order in this
10 case from the State's position, that just ordered
11 the State to do what it was already supposed to
12 do. It became the basis for a \$6 million request
13 for attorney's fees. So from the State's
14 perspective we had to appeal this order because
15 the district court clearly said it was entering
16 an injunction as it related to the scanners.

17 HON. BRITT GRANT: I'm not obviously
18 saying that we would say what you want us to say
19 about that, but what -- given what you've just
20 said, what would be your proposal for how the
21 Court would address this issue?

22 MR. TYSON: And Your Honor, I think the
23 proper method at this point is to find that the
24 scanner order violated Rule 65's specificity
25 requirements, that if a district court was going

1 to enter an injunction that later -- was going to
2 contain later information, it needed to not say
3 it was entering the injunction in that order. It
4 needed to say it was considering entering the
5 injunction. It was taking other steps, not that
6 it was granting the PI.

7 HON. ROBERT LUCK: You're in a fine
8 line here because on the one hand, if it's not
9 specific enough to the -- to a certain point, we
10 don't have appellate jurisdiction. And on the
11 other hand, you want to tell us it's not specific
12 enough but enough for appellate jurisdiction
13 because it violates Rule 65. That is a perilous
14 argument for you.

15 As I understand your argument on
16 appellate jurisdiction, and then we'll turn to
17 Rule 65, it is that there was language of --
18 there was mandatory language requiring certain
19 basic elemental things be done by a date certain.
20 Is that true?

21 MR. TYSON: Your Honor, there are
22 certain -- there was the intent of the district
23 court to enter an injunction, so Chief Judge
24 (indiscernible) concurrence --

25 HON. ROBERT LUCK: Well, beyond that --

1 because I'm not sure that's enough. I'm not sure
2 it's enough to say, "Injunction granted. We'll
3 talk to you later." It -- which is what you're
4 saying here.

5 As I understand, here's what the order
6 said starting -- I'll quote from Page 142. "The
7 expanded methods to address the scanner tabulator
8 and adjudication software's per se blank
9 exclusion of marks that may reasonably be
10 considered by an adjudication panel as indicating
11 voter intent must be in place no later than the
12 next election cycle following the conclusion of
13 the January 2021 runoff."

14 So you have a date certain that
15 something must be done and a baseline with which
16 something must be done. There must be something
17 different done than is currently the law or that
18 currently exists to expand the method that the
19 scanner tabulates such that an adjudication panel
20 can determine voter intent. Right?

21 MR. TYSON: That's correct.

22 HON. ROBERT LUCK: And then it says --
23 and it -- the beginning of that sentence is
24 actually "in any event," because in other words,
25 what she first ordered you all to do is you guys

1 got to sit down. But she says, "In any event, I
2 am ordering this and further relief," not just
3 relief but further relief will come later. Is
4 that a fair representation of the order?"

5 MR. TYSON: I think it's a fair
6 representation, Your Honor.

7 HON. ROBERT LUCK: How is that not
8 specific enough?

9 MR. TYSON: And I think that in this
10 case, it's not specific enough because it did not
11 tell the State what it needed to do to avoid a
12 contempt citation.

13 HON. ROBERT LUCK: Yeah, it did. Do
14 something more than you're doing now.

15 MR. TYSON: But do something more I
16 don't think is specific enough for Rule 65
17 because what does "more" mean in this context?
18 There's a discussion of a variety of different
19 brightness settings, dots-per-inch settings, and
20 the later filings show the plaintiff's only
21 proposed remedy is related to brightness
22 settings, not anything else.

23 HON. ROBERT LUCK: Contempt requires an
24 intentional, willful disregard of a court order.
25 If the State had come and said, "Judge, we've

1 looked at this again, and we've now decreased the
2 scanners to the 5 percent range. We couldn't
3 agree, but this is what we've done there," no
4 judge in the world could ever find that you
5 willfully violated that order, but that order
6 still would have caused you to go back and to do
7 something to comply, right?

8 MR. TYSON: I think it would, Your
9 Honor, except that in -- as Judge -- Justice
10 Kavanagh said in the Merrill versus Milligan
11 case, elections are very complicated to run,
12 especially statewide. The number of moving
13 pieces that are happening here requires very
14 specific direction for the Court, not just go try
15 again and go try to do something different. When
16 the State had already done a study, it had
17 already adopted a rule, there needed to be more
18 specificity, from our perspective, to comply with
19 Rule 65.

20 HON. BRITT GRANT: Did you do anything
21 in response to this order?

22 MR. TYSON: Your Honor, I don't believe
23 there was ever any action taken related to the
24 scanner issue specifically.

25 HON. BRITT GRANT: Did the plaintiffs

1 raise that with the Court?

2 MR. TYSON: No, Your Honor. The
3 plaintiffs took the position that this was not an
4 injunction because the Court never gave specific
5 direction. I believe that's their position on
6 appeal in this case as well.

7 So in my time remaining, let me move to
8 Anderson-Burdick. I think that's a key issue
9 here.

10 HON. LANIER ANDERSON: Let me ask you
11 this.

12 MR. TYSON: Yes, Your Honor.

13 HON. LANIER ANDERSON: Assuming that
14 the scan order is something we have no
15 jurisdiction on, I can't understand really the
16 only belief granted by this pollbook order is
17 that you have to update through -- update the
18 paper ballot -- the paper backup through early
19 voting. I cannot understand why you would not
20 want to do that.

21 MR. TYSON: And Your Honor, the
22 testimony of -- at the hearing was this was
23 actually a lot more complicated than the district
24 court made it. And this kind of goes to our
25 Anderson-Burdick question on this point. There

1 was a reasonable nondiscriminatory election rule
2 in place. The State had paper backups. There
3 was never a question those existed already. The
4 only question was would it include --

5 HON. ROBERT LUCK: I have a legal
6 question. A part of the -- what drove the
7 Anderson-Burdick analysis, frankly, it's like
8 with anything else. If you find a severe burden,
9 you're going to lose.

10 MR. TYSON: Yes.

11 HON. ROBERT LUCK: Is the determination
12 of severity a factual determination or a legal
13 determination for us?

14 MR. TYSON: Your Honor, I believe it
15 has to be a legal determination. It's going to
16 be at least a mixed question of law and fact
17 because the district court obviously goes on at
18 length about all these possible malfunctions,
19 things that county poll workers were doing that
20 were not functioning.

21 But at the end of the day, the
22 theoretical vulnerability and the questions about
23 possible malfunctions can't in and of themselves
24 as a legal matter be a serious severe burden on
25 the right to vote because it's so unforeseeable.

1 And again, this is where these kind of -- these
2 pieces mix together because at the end of the
3 day, the plaintiffs haven't showed that this was
4 certainly going to happen. They showed maybe it
5 might happen. The State is entitled to
6 administer its reasonable nondiscriminatory
7 election rules without the district court's
8 interference.

9 HON. BRITT GRANT: I'd like you to back
10 up and finish answering Judge Anderson's
11 question. I'm interested in that too.

12 MR. TYSON: Yeah. So the key point is
13 the list that was provided included voter
14 registration information, so if a person
15 presented their driver's license, and they went
16 to check in on the poll pad, the check-in unit
17 wasn't working. The poll worker is supposed to
18 consult the paper list, check the voter in, and
19 allow voting to continue.

20 The information on the poll pad
21 includes information updated over the weekend
22 regarding the absentee ballot status for a voter.
23 Because of the nature of the printing schedule
24 for those paper lists that the secretary
25 undertakes, they cannot print those lists from

1 the secretary's side in the weekend after the end
2 of early voting and before Tuesday.

3 So it may be a very good idea to
4 include absentee information. That's something
5 that maybe the State needs to look at. But at
6 the end of the day, it wasn't up to the district
7 court to use its Article 3 powers.

8 HON. LANIER ANDERSON: You told the
9 district court in a written statement that it was
10 feasible.

11 MR. TYSON: I'm sorry, Your Honor. I
12 didn't hear the question.

13 HON. LANIER ANDERSON: You told the
14 district court that it was feasible to do that.
15 You said it's not as simple as that, but it's
16 feasible.

17 MR. TYSON: Certain, Your Honor. And I
18 think this kind of goes back to where the new
19 Georgia project a case was on a lot of this too.
20 There are a lot of good ideas around the
21 administration of elections. The State has
22 procedures.

23 The fact that we'd have to print two
24 different reports, I believe that filing said,
25 and train -- counties have to train poll workers

1 how to use these alternate reports as well.
2 That's a significant change to be happening,
3 especially on the eve of an election. This is a
4 lot more than a Purcell case though because I
5 think as we saw, the scanner order was used by
6 folks challenging the 2020 election to add an
7 aura of credibility around these claims of a
8 stolen election. And hewing closely to Article 3
9 we think is very important here and that these
10 orders should be reversed.

11 And with Your Honor's permission, I'll
12 reserve the remainder of my time.

13 HON. BRITT GRANT: Does anyone else
14 have any questions before he sits? Okay. Thank
15 you.

16 MR. TYSON: Thank you, Your Honor.

17 HON. BRITT GRANT: Mr. McGuire?

18 MR. MCGUIRE: Good morning. May it
19 please the court, my name is Robert McGuire. I
20 represent the Coalition plaintiffs, which is one
21 of the two groups.

22 HON. ROBERT LUCK: Counsel, I'm going
23 to jump right in because you don't have a ton of
24 time.

25 MR. MCGUIRE: Sure.

1 HON. ROBERT LUCK: I'll tell you that -
2 - and I'm only speaking for myself. I think
3 there's standing, and I think that there's
4 appellate jurisdiction, so I'm very interested in
5 the Anderson-Burdick, the merits issue, and so
6 that's where my questions are going to go.

7 And my first one related to the scanner
8 order is this. Where is the evidence in the
9 record -- and point me to it because I didn't
10 find in the district court's order that "the
11 average voter is likely unaware that their
12 failure to adequately darken the oval to a
13 certain percentage may cause their vote to be
14 rejected by the scanner and in turn not count it
15 altogether." That's at 129 and 30 of the
16 district court's order.

17 MR. MCGUIRE: Your Honor, off the top
18 of my head, I don't -- can't point you to where
19 that evidence is. But I can say that I don't
20 believe that evidence is necessary for the Court
21 to have entered the rule as it did on the
22 scanners.

23 HON. ROBERT LUCK: Well, so here's why
24 I think it is because the district court
25 acknowledged right before that sentence that the

1 burden is minimal, argument whether there's a
2 burden at all, but that the burden is minimal.
3 That sentence, however, was the basis for the
4 district court's finding or -- it should be
5 determination that the burden was actually more
6 than minimal because the average voter actually
7 doesn't really know despite the instructions that
8 they have to oval this thing in.

9 So what I want to know is where in the
10 record the district court determined what the
11 average voter would understand even though they
12 were explicitly instructed to oval that -- to
13 oval in a specific oval.

14 MR. MCGUIRE: That was not part of our
15 proof that I recall, so what I will say on the
16 burden is that I think the burden that the
17 district court was talking about there was the
18 burden of complying with the instructions to
19 color in the oval. And that burden certain is
20 minimal. But the burden that's at issue in
21 determining the merit -- the issue here is the
22 burden on the voter of having their vote not
23 count.

24 HON. ROBERT LUCK: And the reason -- I
25 agree with you completely. You're right. But

1 the point that the district court made is the
2 reason why that burden is more than minimal is
3 because the average voter wouldn't understand
4 despite the instruction what they'd have to do
5 and therefore wouldn't do it correctly.

6 And what I want to know is where is the
7 evidence to support that finding because that to
8 me is the critical finding in the whole thing.
9 If that -- to me, if that -- if there's not
10 evidence to support that, that whole thing falls
11 apart because then it becomes minimal, and it's
12 easy for the State to meet the burden.

13 MR. MCGUIRE: Well, again, I can't
14 point you to exactly what evidence she had in
15 mind in that particular passage of her opinion.

16 HON. ROBERT LUCK: Okay. So let's -- I
17 want to go to the pollbook order, what everyone's
18 calling the pollbook order.

19 Let me ask you this. If Georgia law
20 required that all polling places are required to
21 have and to use electricity mired to the grid, to
22 a hardline grid -- that was the statute -- and on
23 election day, the power went out, would that be a
24 severe burden on -- would that be a severe burden
25 on the right to vote?

1 MR. MCGUIRE: That -- if that was the
2 reason why the power went out, then there are
3 emergency procedures which provide for people to
4 cast ballots in that case.

5 HON. ROBERT LUCK: So the answer would
6 be no.

7 MR. MCGUIRE: The answer would be no if
8 that were the cause.

9 HON. ROBERT LUCK: Okay.

10 MR. MCGUIRE: Correct.

11 HON. ROBERT LUCK: Let's assume that
12 Georgia has a statue which says that every
13 polling location in the entire state has to be
14 hooked to some WIFI system, and for whatever
15 reason, in the southeast on election day, the
16 satellite goes down and all WIFI drops, would
17 that be a severe burden on the right to vote?

18 MR. MCGUIRE: Well, I think -- I think
19 the answer to this question and in fact the
20 answer to your former question depends a little
21 bit on the presumption that underlies those
22 facts.

23 We presume that electricity -- the
24 electrical power grid functions normally and
25 isn't routinely defective. If it were routinely

1 defective, it would be a different answer. I
2 would have given you a different answer to your
3 previous question.

4 HON. ROBERT LUCK: Okay.

5 MR. MCGUIRE: So I think -- I think --

6 HON. ROBERT LUCK: So answer my WI-FI
7 question.

8 MR. MCGUIRE: If -- well, it depends on
9 whether there would be evidence that the WI-FI
10 was routinely interrupted or routinely didn't
11 function properly. If it did, if there was that
12 evidence as there is here for the --

13 HON. ROBERT LUCK: Assuming it normally
14 works okay.

15 MR. MCGUIRE: Assuming that it normally
16 works okay and there's not evidence, then I would
17 think that the fact that you're using electricity
18 and that's dependent on the system would not
19 create a burden by itself.

20 HON. ROBERT LUCK: Okay. So let's take
21 a more tangible -- let's take it to here. So
22 here there's a requirement that there be used
23 iPads with an electronic polling system as part
24 of the BMD system that you all are attacking, and
25 that's the basis of the pollbook order. How is

1 that a severe burden that many of those just
2 didn't operate correctly on election day?

3 MR. MCGUIRE: I think the burden for
4 purposes of standing arises from you -- the
5 burden on --

6 HON. ROBERT LUCK: I'm not talking
7 about standing. I'm talking about whether it's
8 severe or not.

9 MR. MCGUIRE: Oh, whether it's a severe
10 burden or not.

11 HON. ROBERT LUCK: I'm -- I think you
12 have standing.

13 MR. MCGUIRE: Okay. So apologies.
14 Your question is whether it's a severe burden to
15 use an iPad, for example?

16 HON. ROBERT LUCK: For the state to
17 require that an iPad be used?

18 MR. MCGUIRE: I don't think there's any
19 burden at all on the State requiring you to vote
20 by a method that works. The burden arises when
21 the method doesn't work.

22 HON. ROBERT LUCK: Right, but there's a
23 risk that any method won't work on any given day.
24 I mean, rain could happen so bad that it floods
25 out a particular polling place. Is that a severe

1 burden? Probably not, right?

2 MR. MCGUIRE: Well, that would -- that
3 obviously would be a burden to the voters that
4 are affected by it.

5 HON. ROBERT LUCK: No, it's a burden
6 that day, but is it a severe burden on the right
7 to vote in the sense that we talk about for
8 Anderson-Burdick?

9 MR. MCGUIRE: I think with the examples
10 that you're giving, I think the proper answer is
11 probably that these are burdens on the right to
12 vote, but the issue is whether there's causation
13 that's reasonably traceable to the defendant's
14 conduct.

15 HON. BRITT GRANT: Right. So wouldn't
16 it be different if say the State put all the
17 polling places in the places where they thought
18 that their preferred party wouldn't get the vote,
19 in the floodplain, right, and they just expected
20 that that was going to happen. That would
21 certainly be different than a 100-year flood
22 happens, or even an ordinary flood, right? A
23 pipe bursts. Things -- you know, things happen.
24 Why is this any different than things happen?

25 MR. MCGUIRE: So are we -- is -- may I

1 address your question on the standing issue or
2 the merits issue?

3 HON. BRITT GRANT: We're not talking
4 about standing. Standing is over.

5 MR. MCGUIRE: Okay. We're just talking
6 about merits.

7 HON. BRITT GRANT: Yeah.

8 MR. MCGUIRE: So I guess what's
9 confusing me is that the way we conceive of
10 burden here is that the burden on the voter is
11 the burden on the ability to vote. And the
12 method of voting is not a burden unless the
13 method results in depriving you of the ability to
14 cast your vote. And so it --

15 HON. LANIER ANDERSON: Counsel, it
16 seems to me the best answer you might have to
17 questions asked by both Judge Luck and Judge
18 Grant is something along the following lines.

19 Obviously a storm that knocks out all
20 the power is not something that we could deal
21 with in a court order. But the problem in this
22 case and your answer to them, it seems to me,
23 would be that there's a lot of evidence in this
24 case, and the evidence is that these pollbooks
25 did not operate in three different elections time

1 after time after time, and there were numerous
2 causes, probably.

3 But a considerable part of the cause,
4 probably, is the lack of training and, in
5 particular, the lack of training in how to use
6 the backup, and in particular the lack of
7 training in the use of provisional ballots when
8 emergency ballots should've been used if they had
9 referred to the backup. Even though the pollbook
10 is not operating electronically, the backup would
11 show that the voter is supposed to vote in this
12 precinct, and he should be allowed then to vote
13 on emergency ballot and not a provisional ballot.
14 Why is that not your answer to some of these
15 questions anyway?

16 MR. MCGUIRE: Well, I think -- I think
17 our answer -- I certainly will accept that as an
18 answer that I would be happy to give.

19 I think the -- what is causing me to
20 stumble here is that the thing that is causing
21 the burden is not the method of voting. The
22 method of voting is we're agnostic as to the
23 method of voting if the method of voting allows
24 people to vote. It's the fact that the State is
25 doing something which is -- which is failing to

1 provide an updated pollbook to take account of
2 predictable failures.

3 HON. ROBERT LUCK: I understand that,
4 but the method of voting is -- which includes all
5 of that is part of why the district court
6 determined that it's severe. And the vagaries of
7 any given day at any given time could affect the
8 voting. If it's paper and for some reason, you
9 know --

10 HON. BRITT GRANT: Printer jam.

11 HON. ROBERT LUCK: The printer jams or
12 the ink is disappearing, or there's a paper
13 shortage like there is a shortage of a lot of
14 other things going on in today's day and age.
15 None of that would be called a severe burden even
16 though, obviously, it would interfere with the
17 right to vote.

18 MR. MCGUIRE: Yes.

19 HON. ROBERT LUCK: You would agree?

20 MR. MCGUIRE: I would agree with that,
21 although I would dispute that -- whether these
22 are vagaries. I think that these are not the
23 kind of vagaries of life that would appear to be
24 just random arbitrary --

25 HON. ROBERT LUCK: Technology not

1 working?

2 MR. MCGUIRE: Technology not working in
3 the course of --

4 HON. ROBERT LUCK: I've had that vagary
5 just today, this morning, since I got here.

6 MR. MCGUIRE: It's certainly something
7 that happens routinely in life, but it's not
8 something that happens routinely in elections
9 when you're running a system where you involve --
10 you require technology to vote, and then the
11 technology itself has been proven repeatedly to
12 be -- to be defective. The problem for us is
13 that they are not providing a mitigation for that
14 foreseeable problem.

15 HON. BRITT GRANT: First question. Do
16 you know if the State or the county provides
17 training to poll workers related to the
18 pollbooks?

19 MR. MCGUIRE: I believe the counties
20 provide the training directly.

21 HON. BRITT GRANT: So could we as a
22 Court hold the State responsible for lack of
23 training on how to use the pollbooks?

24 MR. MCGUIRE: The State -- the State is
25 -- under Grizzle v. Kemp, the State is the chief

1 enforcement officer of the election code in
2 Georgia, and so the State prescribes --

3 HON. ROBERT LUCK: That's not good
4 enough under Jacobson though. I mean, we were
5 clear in Jacobson that that is -- it's not enough
6 just to say you're the chief election officer,
7 and you're responsible for all of it. You've got
8 to -- you've got to drill down on who's
9 responsible for what specific thing to determine
10 redressability and traceability for standing.

11 MR. MCGUIRE: And that is why also we
12 named Fulton County as a defendant in the case
13 and why they were enjoined as well as the State
14 was in this matter.

15 So I see I'm over my time. We were
16 going to divide time, so I can turn it over to my
17 counsel unless you have more questions for me.
18 Mr. Qian is going to be discussing the
19 separateness of this case, the narrowness of this
20 appeal, so I'm happy to answer more questions, or
21 I can turn it over to him for him to address
22 this.

23 HON. BRITT GRANT: It's your time, so
24 you all can decide.

25 MR. MCGUIRE: I would just conclude by

1 saying from the Coalition perspective --
2 Coalition plaintiff's perspective, we would
3 respectfully request that you affirm the pollbook
4 order and lift the stay on it, and dismiss the
5 scanner order as unappealable.

6 MR. QIAN: Good morning, Your Honors.
7 May it please the Court, Michael Qian for the
8 Curling plaintiffs, Donna Curling, Donna Price,
9 and Jeffrey Schoenberg.

10 HON. ROBERT LUCK: So can I pick up
11 where your -- on a thread that your opposing
12 counsel talked about? So in discussing some of
13 the hypotheticals, your -- including the
14 electricity one and the WI-FF one, your opposing
15 counsel said one reason the burden would not be
16 severe because, if the -- for instance, the
17 electricity went out in the entire grid in the
18 southeast on election day was Georgia very wisely
19 has an alternative paper ballot system for
20 emergency ballots that are actually counted.
21 They aren't provisional. You just check off the
22 pollbook.

23 Here, I understand the pollbooks aren't
24 updated to the nth degree, but they have a list -
25 - a paper list of the voting rules, and they have

1 voting ballots. How, even if the electronic
2 system is so unreliable, does that not take care
3 of any severity with regard to the burden?

4 MR. QIAN: It doesn't take care of it
5 because there is still a burden imposed by
6 forcing voters to vote provisionally instead of
7 on ordinary ballot.

8 HON. ROBERT LUCK: So the emergency
9 system -- I think you both are at pains and the
10 district court is at pains to say it's not a
11 provisional system, and I tend to agree with you
12 on provisional.

13 The -- there is, as I understand it,
14 three votes. There's regular on the electronic.
15 That's emergency votes if the electronic system
16 goes down, and going down means lines of 30
17 minutes or more, the electricity goes off,
18 something like that, defined by regulation. And
19 then provisional for those who for some reason
20 the pollbook is not updated, and they can't --
21 they're listed in the wrong place. Is that
22 correct?

23 MR. QIAN: To be honest, Your Honor,
24 I'm not sure because these were the Coalition
25 plaintiff's claims. But what I do know from the

1 district court's order is that there is evidence
2 that voters were required to vote provisionally,
3 and that does impose a burden on those voters.

4 And let me just make one more point
5 about this question about the vagaries of life.
6 You know, one way you can think about this is the
7 magnitude of the burden. And there, I would say
8 that if a voter doesn't get to vote or has to
9 vote on a provisional ballot, that is a severe
10 burden on that voter. But I think the --

11 HON. ROBERT LUCK: The problem is,
12 Counsel -- and I'm sorry to interrupt, but that's
13 true of the electricity example. It's true of
14 the WI-FI example. It's true if there's a one in
15 a 100-year flood. It's true of lots of things
16 that we don't call a severe burden.

17 MR. QIAN: That's true, Your Honor.
18 And two differences I would point out in this
19 case. One, it's as if the flood or the leak in
20 the roof happened year after year in every single
21 election. Then I think you would say that there
22 is a severe burden on the voters.

23 The second is -- second point I would
24 make is that I think those problems -- those
25 issues are better dealt with on the other side of

1 the ledger of the Anderson-Burdick balancing
2 test. It's the State's interest. The State does
3 have a severe interest not having to plan around
4 a 100-year flood. But if the problem is easily
5 avoidable just by printing what they're already
6 printing, just at a later date, it's a minimal
7 burden on the State. And that's why the
8 Anderson-Burdick analysis comes out in our
9 (indiscernible) here.

10 HON. ROBERT LUCK: But that -- we don't
11 look at it that way. In other words, we don't
12 say, "This is a really good idea, and it doesn't
13 cost the State so much, so we're going to require
14 that." That's not what this is about.

15 What this is about is, is this a severe
16 -- is the fact that it's not updated by about
17 three or four days, is whatever minimal harm that
18 is to the right to vote balanced against whatever
19 State interest has in doing so?

20 And it seems to me that it's really
21 minimal to say that we're going to print it out
22 this day as opposed to this day, and that might
23 affect a really small handful that might have to
24 vote provisionally whose votes will end up being
25 counted anyway. And again, we're only talking

1 about a case of emergency.

2 MR. QIAN: I think, Your Honor, that
3 ultimately it is a balancing test. And so
4 regardless of whether you're labeling it a severe
5 burden or a minimal burden, you still have to
6 balance the burden on voters who will not get to
7 vote or who will have to vote provisionally
8 against a minimal state interest on the other
9 side.

10 If I could just address --

11 HON. BRITT GRANT: Are we supposed to
12 go back there to the conference room and hash it
13 out amongst ourselves what we would do if we were
14 in the Georgia legislature, what we think would
15 be the most effective way to make the line
16 shorter and the voting easier? Is that -- is
17 that what the Supreme Court has said we should
18 do?

19 MR. QIAN: No, Your Honor. It's a
20 balancing test like many other constitutional
21 frameworks. It's a well-establishing balancing
22 test under Burdick-Anderson, and the district
23 court had the full record before it. It assessed
24 these, and the question is just whether the
25 district court committed some error, and I don't

1 think the State defense has pointed to one.

2 If I could just address the scanner
3 order briefly. There is no appellate
4 jurisdiction because the district court entered
5 no injunction.

6 Judge Luck, you pointed to a line in
7 the district court's order where it talked about
8 expanded methods, but in the very next sentence,
9 the district court explained that those methods
10 would be identified through further proceedings.
11 It --

12 HON. ROBERT LUCK: No. It says it
13 would grant further relief after you guys sat
14 down together, but it set the standard. It said
15 you must do something by a certain date, and it
16 told the State what that something was. It says
17 you need to expand the method such that a -- I
18 forget what the -- the Board, whatever the Board
19 who looks at these -- can reasonably determine
20 voter intent. How is that not a directive to do
21 something?

22 And if -- let's assume the State did
23 nothing, so this piggybacks off Judge Grant's
24 question. Let's assume the State said, "I'm not
25 doing anything until we sit down, and we can't

1 agree, so we're at a standstill. I'm not doing
2 anything." You're telling me you wouldn't run to
3 the Court to say, "You said in any event they had
4 to do something by this date, and they didn't do
5 it, so require it"?

6 MR. QIAN: I'm -- so two things, Your
7 Honor. First, I respectfully disagree with your
8 reading of the district court's order. I think
9 the further relief in the next sentence is
10 talking about the expanded methods. And that's
11 clear in context of the district court --

12 HON. ROBERT LUCK: Why use "further"?
13 Doesn't "further" imply that it granted relief?

14 MR. QIAN: No, Your Honor. It's --

15 HON. ROBERT LUCK: Really?

16 MR. QIAN: Yes, Your Honor, because
17 there is no instruction to the State defendants
18 in this order. They're -- so it's not just the
19 absence of that language. It's the presence of
20 the district court clarifying that it would hold
21 further proceedings to identify what the relief
22 was. You can also --

23 HON. BRITT GRANT: Did the plaintiffs -
24 - did the plaintiffs -- any plaintiff file asking
25 the district court to enter an injunction?

1 MR. QIAN: Yes, Your Honor. There were
2 further proceedings after this order. Each side
3 submitted their proposed remedy, and then very
4 importantly, the district court issued a further
5 order -- it's at Docket 1021 -- where it further
6 deferred proceedings on the remedy.

7 So the district court was clear in both
8 Order 964 and in 1021 that it had not yet entered
9 anything. The date certain, Your Honor, Judge
10 Luck, was -- it was after -- it said after the
11 January 2021 elections. It didn't say do
12 anything by January 2021. It said after, and
13 that's even clearer taking into account Order
14 1021.

15 But let me also address Judge Luck's
16 point about the practicalities of the situation
17 and how the parties have behaved because I think
18 that removes any doubt.

19 State defendants conceded this morning
20 they have done nothing differently because --

21 HON. ROBERT LUCK: Counsel, I want to
22 go back to what you said. You're way over time,
23 but you -- that needs to be corrected, what you
24 just said. On Page 142, it says, "Must be in
25 place no later than the next election cycle

1 following the conclusion of the January 2021."
2 It didn't just say in some date in the future.
3 It said next election cycle.

4 MR. QIAN: Your Honor, it said not the
5 January 2021 elections. Some -- the elections
6 after that.

7 HON. ROBERT LUCK: The date -- the next
8 election after that. It's a date certain.

9 MR. QIAN: But Your Honor, taken in
10 context, especially with Order 1021, what the
11 district court was doing was deferring
12 proceedings on the remedy.

13 And again, you know that by how the
14 parties have acted, and the State defendants
15 haven't changed their conduct. They never sought
16 a stay of that order, which they would've done if
17 they thought they were under some sort of
18 injunction order, if they thought they were under
19 order of contempt because that's what they did
20 with the pollbook order, which was an injunction.
21 It's --

22 HON. BRITT GRANT: I have a question
23 about what interests both the parties might have,
24 all the parties have, besides what happens with
25 the scanners. Your friends on the other side

1 indicated a concern about attorney's fees. Is
2 that something that changes depending on what we
3 decide about whether this is appealable?

4 MR. QIAN: Your Honor, I -- to be
5 honest, I'm not in a position to answer that
6 because this was the Coalition plaintiff's
7 motion. I'm just here to underscore the limited
8 nature of this Court's appellate jurisdiction --

9 HON. BRITT GRANT: But why --

10 MR. QIAN: -- in this appeal.

11 HON. BRITT GRANT: If it's not -- if
12 it's not your motion or your party isn't
13 concerned about it, then why are you here talking
14 to us about it?

15 MR. QIAN: My client's concern is,
16 again, to underscore the limited scope of these
17 appeals because State defendants have made broad
18 arguments that affect my client's interests, for
19 example on the ballot-marking device claims. And
20 so I just want to be clear about --

21 HON. BRITT GRANT: The ballot-marking
22 device claim was a Coalition claim. Isn't that
23 what you just said?

24 MR. QIAN: I'm sorry. I represent the
25 Curling plaintiffs.

1 HON. BRITT GRANT: Right.

2 MR. QIAN: Both the Curling and
3 Coalition plaintiffs brought ballot-marking
4 device claims.

5 The reason that I'm here today on
6 behalf of the Curling plaintiffs is because the
7 State defendants made arguments regarding the
8 ballot-marking device claims, and our response to
9 that is that's not at issue in this appeal. This
10 Court shouldn't address it. And that the
11 appellate jurisdiction, even over the scanner
12 order is limited.

13 I don't have a view on the attorney's
14 fee question that Your Honor identified. To my
15 knowledge, there haven't been proceedings on
16 attorney's fees as to the scanner order in the
17 district court, and so I think that's something
18 that would be resolved in future litigation.

19 HON. BRITT GRANT: Thank you.

20 MR. QIAN: Thank you.

21 HON. BRITT GRANT: Mr. Tyson, you have
22 three minutes.

23 MR. TYSON: Thank you, Your Honor. I
24 think that what we've heard is the kind of
25 evidence-is-unnecessary idea, that we can just

1 look and see there's problems, and therefore the
2 State has responsibility, almost a res ipsa
3 theory of election administration.

4 I think what the Court sees here is
5 there's not a flipping of the burden. It's not
6 the State's burden to disprove --

7 HON. ROBERT LUCK: Well --

8 MR. TYSON: -- their problems.

9 HON. ROBERT LUCK: I think you need to
10 address Judge Anderson's question. And what
11 Judge Anderson's question was -- in giving a very
12 articulate response to questions that I had and
13 Judge Grant had -- which is that at some point,
14 when the flood happens every single time and you
15 don't change the polling place, at some point
16 when the electricity goes out on election day
17 every single time, is the State not then charged
18 with doing something -- and not charged with the
19 burden being severe by not doing something? I
20 think that's really the question you have to
21 answer.

22 MR. TYSON: And I think that if there
23 can show a kind of duty over time that is being
24 violated -- if you know for certain, for example,
25 to Judge Grant's question that you always place

1 the opposing party's political precincts in an
2 area where things are likely to go wrong.

3 I think we have though, really at a
4 root in that problem -- so I agree, number one,
5 that that could be a claim. I don't want to say
6 that's not correct. I think we get back to our
7 Jacobson traceability, redressability problem
8 though because what we find in Georgia elections
9 is as a matter of statute and practice, counties
10 run elections.

11 HON. ROBERT LUCK: So I have to say I'm
12 very familiar with Jacobson, and I'm familiar
13 with Florida's system.

14 So I did a lot of digging, and I don't
15 know how you get around -- and please tell me how
16 you do -- the Georgia statute, and I'm talking
17 about 21-2-300 in all of its glory. "The
18 equipment used for casting and counting votes,
19 for counting votes in county, state, and federal
20 elections shall be the same in each county of the
21 state and shall be provided by the State as
22 determined by the secretary of state." The
23 secretary of state determines the method of
24 voting.

25 MR. TYSON: Absolutely.

1 HON. ROBERT LUCK: That's different
2 than Florida.

3 MR. TYSON: That is different than
4 Florida, but I think the key distinction that is
5 the same as Florida is county officials still
6 carry out the training of the poll workers, so
7 under --

8 HON. LANIER ANDERSON: The State --
9 there's a statute, Georgia statute that says that
10 the secretary of state is responsible for
11 training the election superintendents in each
12 county.

13 So I think the ultimate duty of
14 training falls on the secretary of state, and the
15 secretary of state certainly has authority, it
16 seems to me, to direct the superintendents of
17 election in each county as to the kind of
18 training that needs to happen, which the evidence
19 in this case shows they need to train them about
20 use of the backup -- oh my goodness. I apologize
21 for that.

22 HON. BRITT GRANT: I'll ask you a
23 question while he's doing that. Was there
24 evidence discussed about the nature of the
25 secretary's training of the election supervisors?

1 Was that a part of the case?

2 MR. TYSON: No, Your Honor. That is a
3 part of some other cases that are going on in the
4 northern districts, but I would agree with Judge
5 Anderson that the secretary has a duty to train
6 county superintendents. The county
7 superintendents then by statute, as we cited in
8 our brief, have the authority and responsibility
9 to train the poll workers.

10 And so this has never been a failure-
11 to-train case. This has always been an Anderson-
12 Burdick equal protection style case, and I'm not
13 aware of any evidence in the record related to
14 the training of the secretary of local election
15 officials.

16 HON. ROBERT LUCK: We won't hold Judge
17 Anderson in contempt on his last day. But my
18 question here is something your opposing counsel
19 said, which is that unlike Jacobson -- part of
20 the problem in Jacobson was they only sued the
21 secretary of state, but they didn't do that here,
22 right? They had a county official. In fact,
23 they had the person responsible for county
24 elections that was before the Court, correct?

25 MR. TYSON: The Fulton County -- one

1 single county. Yes, Your Honor.

2 HON. ROBERT LUCK: Right. So at least
3 as to that county, and I agree with you that
4 might affect the scope of the injunction, but at
5 least as to that county, they had every
6 redressable and traceable party, did they not?

7 MR. TYSON: Your Honor, I would agree
8 that if you have a county election superintendent
9 in the case, then you can properly bind that
10 county. You may be in a Bush versus Gore problem
11 for the other 158, but --

12 HON. ROBERT LUCK: I don't disagree
13 that it might go to the scope of the injunction
14 and problems with that, but at the very least,
15 when we're talking about standing, they at least
16 would have standing with regard to that claim as
17 to that county, correct?

18 MR. TYSON: I believe that would be
19 correct as to that county, Your Honor.

20 HON. ROBERT LUCK: Okay.

21 HON. BRITT GRANT: I want to make sure
22 I understand something that you said. Has
23 training -- I know training has been mentioned in
24 the briefing. Has training been part of the
25 relief sought in this case?

1 MR. TYSON: Your Honor, the district
2 court has ordered training in several different
3 orders along the way. I believe the 2019 order
4 included some training relief.

5 Standing here today, I don't recall
6 anything from the record in terms of training of
7 local election officials that was testimony
8 during the various preliminary injunction
9 hearings. There's been four different rounds of
10 preliminary injunctions in this case.

11 HON. BRITT GRANT: What about has this
12 -- has this paper -- has this paper voter list
13 been presented as a mitigation for a lack of
14 training?

15 MR. TYSON: Not that I recall in that
16 way, Your Honor. It's always been presented as
17 there is a severe burden on the right to vote by
18 not including this information on the paper
19 backups that are in the polling places.

20 HON. BRITT GRANT: All right. Thank
21 you.

22 MR. TYSON: Thank you, Your Honor.

23 HON. BRITT GRANT: Thank you all for
24 your arguments. It's been of great help to the
25 Court. We are in recess until tomorrow morning

1 at 9.

2 CLERK: All rise.

3 (End of proceedings)

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certify that the foregoing transcript is a true and accurate record of the proceedings.

Sonya M. Ledanski Hyde

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